In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1288

AMERICAN OIL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1—A–6) is reported at 387 F. 2d 786. The Board's decisions (Pet. App. A–10—A–33, A–47—A–62) are reported at 154 NLRB 393, and 160 NLRB 541.

JURISDICTION

The decree of the court of appeals was entered on November 8, 1967 (Pet. App. A–7—A–8), and a petition for rehearing was denied on January 9, 1968 (Pet. App. A–9). The petition for a writ of certiorari was filed on April 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-213—68

QUESTION PRESENTED

Whether the court of appeals correctly concluded that, on the facts of this case, the Board was warranted in finding that the Company's "process supervisors" are not supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. A–63—A–64.

STATEMENT

The Board found that petitioner Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain collectively with the Oil, Chemical and Atomic Workers International Union, AFL–CIO, which had been certified by the Board as the representative of the Company's operating and maintenance employees at its oil refinery at Wood River, Illinois. The sole issue is whether the Company's refusal was justified because the designated unit included "process supervisors," who the Company contends are supervisors within the meaning of Section 2(11) of the Act and thus should have been excluded. The facts controlling the status of the "process supervisors" are as follows:

On September 29, 1964, shortly after the Board's regional director scheduled a hearing on the representation petition filed by the Union, the Company distributed a bulletin to its employees announcing that "stillmen," "treaters," "pumpers," and "engineers" were reclassified as "process supervisors," and would

have, *inter alia,* the authority responsibly to direct the work of the men under them, to make recommendations respecting promotions and raises, to entertain or adjust grievances, and to administer appropriate discipline in accordance with prescribed procedures (Pet. App. A–13, A–31—A–33). For at least the preceding 15 years of the Company's bargaining relationship with Local 115 of the Independent Oil Workers Union, it had regarded stillmen, treaters, pumpers, and engineers as non-supervisory personnel who were within the bargaining unit covering operating and maintenance employees (Pet. App. A–12—A–13; J.A. 110–111, 118, 1187–1188).[1] The Board found that, notwithstanding the alteration in job title and the formal change in status, the alleged change in responsibilities and authority was "more illusory than real" since these individuals continued to function as before and did not "possess and exercise actual supervisory duties" (Pet. App. A–26—A–27).[2]

The Company has 46 process supervisors working in the three of its divisions involved. Each of these divisions is headed by a superintendent, and below him are general foremen, assistant general foremen, and shift foremen—all of whom are admittedly supervisors under the Act. (Pet. App. A–19; J.A. 1198,

[1] "J.A." refers to the Joint Appendix in the court below, which is part of the record filed in this Court.

[2] Indeed, not all stillmen, pumpers, and engineers were reclassified as process supervisors. Some of the individuals in these classifications, although performing the same work as those who were reclassified, retained their old job titles (Pet. App. A–27; J.A. 753–754, 782–785, 756–757, 787–790, 828, 1219, 1206–1207).

1201, 363–364.) Each of the process supervisors generally works with from one to three operators; in a few instances, with four or five (Pet. App. A–19—A–20; J.A. 1205–1207, 1209).[3]

The duties of the process supervisors are illustrated by the work of the "cat cracker" unit in the Light Oils Division. Employees in this unit maintain air flow from the blower, maintain valve control on gases leaving the generator, control levels of catalysts, maintain temperatures and pressures in the vessels, and watch the rate of flow of "gas oil" entering the reactor. The work, including that of the process supervisor, normally requires moving about the unit, observing and reading gauges and equipment, turning valves and switches, keeping records, and cleaning the unit. The process supervisor works directly in the unit and also spends time in the control room, where there is a board with indicators and instruments. He may tell an operator to make changes to insure reactor temperatures, but the operator or boardman in the unit may himself make any necessary adjustments. (Pet. App. A–17—A–18.) The method of operating this and other units is detailed in an operating manual and in daily orders from the assistant general foreman (Pet. App. A–24; J.A. 373–382, 473,

[3] Before the reclassification, there were 19 men concededly of supervisory status in one of the divisions staffed by 130–140 hourly paid employees, or 1 supervisor to approximately 7 employees. If the 28 process supervisors in that division are also supervisors within the meaning of the Act, there are now 47 supervisors to 105–115 employees, or 1 "supervisor" to slightly more than 2 employees. (Pet. App. A–20; J.A. 423–424, 353–354.)

778–779, 795). Moreover, a written manual sets out in detail the procedure involved in startups and shutdowns; the decision to shut down is made by a foreman unless there is an emergency, in which case even an operator may shut down the equipment (Pet. App. A–24—A–25; J.A. 507–509, 513–514, 587–588, 673, 927–931, 938–939, 1047–1049, 1083–1088).

In rejecting the contention that process supervisors have effective power to recommend changes in the status of other employees the Board found that a process supervisor cannot effect a transfer even in an emergency situation where help outside the unit is needed; he asks a superior for additional men. (Pet. App. A–20—A–21; J.A. 292–297, 520–521, 745–746, 945–947, 963, 1069.) Process supervisors do not have authority to suspend employees (Pet. App. A–21; J.A. 304–305, 989), or to promote, reward, lay off, or recall employees (Pet. App. A–21—A–22; J.A. 306, 308–310, 457–458, 640, 810–811, 951–952, 1070–1071).[4] There have been no instances where a process supervisor has discharged an employee (Pet. App. A–22; J.A. 809, 985, 989), or adjusted a grievance (Pet. App. A–23).[5]

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[4] Procedures covering these matters are governed by the collective bargaining agreement (Pet. App. A–21; J.A. 412, 869). Moreover, General Foreman Wishlinski testified that promotion procedures, which are based on seniority, do not allow for effective recommendations by any supervisor, and that pay increases based on meritorious performance could be granted only to supervisory personnel (Pet. App. A–21; J.A. 893–894, 905–906).

[5] In the only case where a grievance was presented after the reclassification, the process supervisor involved referred the grievant to the assistant general foreman (J.A. 985–988).

Scheduling and assignment of work on the unit is done a week in advance by the general foreman (Pet. App. A–26; J.A. 592–593, 608–609, 652–654, 779–780, 851). Although process supervisors have been allowed, since the reclassification, to write up work orders for mechanical repairs, these orders are submitted either to the mechanical area or to the shift foremen, who still assign priorities to the work requested and can postpone or even reject the request (Pet. App. A–25; J.A. 325, 578–580, 615–616, 642–650, 773–775, 699–700, 820–821, 848, 973–974, 977–980).

Based on these facts and the other evidence in the record, the Board concluded that, despite their new title and the purport of the September 29, 1964, bulletin, the process supervisors did not possess sufficient authority to make them supervisors within the meaning of Section 2(11) of the Act—that they were at most "leadmen or the kind of minor supervisors that Congress did not intend to exclude from the coverage of the Act" (Pet. App. A–27—A–28). Accordingly, the Board held that the process supervisors were properly included in the operating and maintenance unit, and ordered the Company to bargain with the Union for that unit (Pet. App. A–28, A–58—A–59). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A–1—A–6).

ARGUMENT

Section 2(11) of the Act defines a "supervisor," who is excluded from the Act's coverage, as:

> any individual having authority * * * to hire, transfer, suspend, lay off, recall, promote, dis-

> charge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The question whether an individual is a "supervisor" involves the application of these criteria to the facts of each particular case, and the Board's determination, if supported by substantial evidence, is entitled to stand. Cf. *National Labor Relations Board* v. *United Insurance Co.*, Nos. 178 and 179, this Term, decided March 6, 1968. The Board has correctly applied those criteria here, and the facts summarized in the Statement (*supra*, pp. 2–6) show that there is ample evidentiary support for its conclusion, sustained by the court below, that the Company's "process supervisors" do not possess the authority and judgment required to make them supervisors within the meaning of Section 2(11) of the Act.

Contrary to the Company's contention (Pet. 8–10), the Board and the court below did not ignore the settled principles (1) that any of the powers enumerated in Section 2(11) is sufficient to make an individual a supervisor, and (2) that it is the possession of the power, and not its exercise, which is decisive. On the contrary, the Board found that process supervisors possessed *none* of the powers set forth in Section 2(11). To be sure, in making this finding, the Board took into account the fact that there was no showing that the process supervisors, either before or after

their reclassification, performed certain functions. But this inquiry was a perfectly proper consideration in the Board's assessment of the status of process supervisors. While the non-exercise of a power otherwise shown to exist may not be sufficient to negate supervisory status, the question whether a function is performed is certainly a relevant factor in determining whether power to exercise it in fact exists.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The cases relied on by the Company (Pet. 9–10) are distinguishable on their facts. *E.g.*, in *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385 (C.A. 6), certiorari denied, 338 U.S. 899, the court found that the control operator, with some minor exceptions, "handles the entire operation of the plant," and that "in time of emergency" he had "authority * * * to requisition any men on the spot" (pp. 387, 388). As shown *supra*, the process supervisors here did not have similar authority.

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